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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF CONNECTICUT,

Petitioner,

V.

ALAN H. MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
CONNECTICUT SUPREME COURT

BRIEF OF AMICI CURIAE, DELAWARE, FLORIDA, INDIANA, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VERMONT, AND VIRGINIA*

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1100

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

REASONS FOR GRANTING WRIT 2

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF A COURT OF APPEALS AND WITH PRIOR DECISIONS OF THIS COURT. 2

II. THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT. 2

III. THE LOWER COURT DID NOT DECIDE THE APPLICABILITY OF SHEPPARD AND LEON TO WARRANTLESS SEARCHES; BUT IF IT HAD DONE SO, THAT ISSUE WOULD ALSO CONSTITUTE A QUESTION OF FEDERAL LAW WORTHY OF CERTIORARI AND CONTAINED WITHIN THE QUESTIONS PRESENTED HERE. 4

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Colorado v. Quintero, 103 S. Ct. 3535 (1983) 6
Illinois v. Gates, 462 U.S. 213 (1983) 4
Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984) 1, 2, 3, 4, 5, 6, 7
Massachusetts v. Upton, 104 S. Ct. 2085 (1984) 4
Payton v. New York, 445 U.S. 573 (1980) 6
United States v. Cassity, 104 S. Ct. 3581 (1984) 2
United States v. Crozier, 104 S. Ct. 3575 (1984) 2
United States v. Johnson, 457 U.S. 537 (1982) 4
United States v. Leon, 104 S. Ct. 3405 (1984) 1, 2, 3, 4, 5, 6, 7
United States v. Morgan, No. 84-1357, 37 Cr. L. Rptr. 4030 (U.S. S.Ct. *petition for cert. filed* Feb. 25, 1985) 6
United States v. Sager, 743 F.2d 1261 (8th Cir. 1984) 2, 4
United States v. Tate, 104 S. Ct. 3575 (1984) 2
Williams v. United States, 622 F.2d 830 (5th Cir. 1980) 6

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INTEREST OF AMICI CURIAE

Amici curiae are States that are parties to cases pending upon direct appeal in which exclusionary rule issues are presented. They submit that the objective good-faith principle of *United States v. Leon*, 104 S.Ct. 3405 (1984), and *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1984), should be applied to cases on direct review or on petition for habeas corpus. The number of such cases is substantial, and the cases in which review is sought tend to be the more serious criminal cases. For these reasons, and for those set forth below, amici urge this Court to grant the writ of certiorari.

Amici also note Connecticut's argument on the first Question Presented, which concerns a state court's duty correctly to decide federal claims properly put before it irrespective of the quality of briefing. Amici agree with this proposition and wish to express support for Connecticut's argument. This

brief, however, is confined to the second Question Presented, concerning the applicability of the good-faith principle.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF A COURT OF APPEALS AND WITH PRIOR DECISIONS OF THIS COURT

As Connecticut has pointed out, the decision of the Eighth Circuit in *United States v. Sager*, 743 F.2d 1261, 1263-64 (8th Cir. 1984), applied the good-faith principle to a case pending on petition for rehearing, although the issue had not been raised at any earlier point in the trial or appellate courts. The decision in *Sager* is in conflict with the decision in the case at bar.

Further, as Connecticut has indicated, this Court's summary reversals in *United States v. Cassity*, 104 S.Ct. 3581 (1984); *United States v. Tate*, 104 S.Ct. 3575 (1984); and *United States v. Crozier*, 104 U.S. 3575 (1984), are in conflict with the decision below.

II. THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The question whether the objective good-faith principle of *Sheppard* and *Leon* should be applied to pending cases is a substantial question of federal law that has not been, but should be, decided by this Court. Two-tier review through a state court of appeals and a state supreme court can sometimes occupy many years. The most serious criminal cases occupy longer periods. Capital cases, for example, may require more than a decade for resolution. A substantial number of such cases presents exclusionary rule issues, and the appropriate standard for judging most of such cases would

be affected by *Sheppard* and *Leon*.

The cost of a refusal to apply *Sheppard* and *Leon* would be high. It would be reversal of convictions in which the defendant was fairly and appropriately found guilty and in which the principal question is one that would be controlled today by *Sheppard* and *Leon*. Those cases are explicitly based upon an assessment of the costs and benefits of exclusionary rule application in differing circumstances. *See Leon, supra*, 104 S.Ct. at 3412-13.

On the other hand, as Connecticut indicates, the cost of applying *Sheppard* and *Leon* to pending cases such as the present case would be low. No reliance interests would be invaded, because it is inconceivable that the respondent structured his transaction in reliance on earlier law. The issue can be decided on the existing record, because (as Connecticut has indicated) the question of good faith is to be determined by reference to objective factors. Furthermore, the briefing necessary to inform courts on questions pursuant to *Sheppard* and *Leon* is briefing upon questions they ultimately must decide in any event, concerning law that they must apply in all future cases.

Finally, nothing is lost in this situation by a rule that mandates a correct outcome under present law. In the case at bar, for example, the court below found the question to be a "close" one even under traditional probable cause analysis, in which the officers "may well have" had "reasonable and articulable" suspicion as a basis for their actions. Appendix at 26a. The court's own recognition that it was actually deciding the case under the wrong standard (which it refused to analyze differently because it had been initially led elsewhere by inadvertent errors in the briefing, Appendix at 21a-22a), is itself an example of the lopsided balance of cost and benefit that results when *Leon* and *Sheppard* are not applied. As *Leon* says, "[p]articularly when law enforcement officers have acted in good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." 104 S.Ct. at 3413. Therefore, "as with any remedial device, the

application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* This approach is entirely consistent with the application of good faith to pending cases, such as the present case.

Substantial questions are further presented by the application of the test for retroactivity contained in *United States v. Johnson*, 457 U.S. 537 (1982), to the case at bar. As Connecticut demonstrates, the *Johnson* criteria support the application of *Sheppard* and *Leon* to pending cases. *See United States v. Sager, supra* (good faith applicable even though raised for the first time on rehearing, under traditional analysis); *cf. Massachusetts v. Upton*, 104 S.Ct. 2085 (1984) (application of *Illinois v. Gates*, 462 U.S. 213 (1983), to pending case).

III. THE LOWER COURT DID NOT DECIDE THE APPLICABILITY OF *SHEPPARD* AND *LEON* TO WARRANTLESS SEARCHES; BUT IF IT HAD DONE SO, THAT ISSUE WOULD ALSO CONSTITUTE A QUESTION OF FEDERAL LAW WORTHY OF CERTIORARI AND CONTAINED WITHIN THE QUESTIONS PRESENTED HERE.

The lower court's refusal to apply the good-faith principle is contained entirely within a single footnote. The court stated as follows:

> While this case was on appeal to this court, the United States Supreme Court held that the exclusionary rule, as effected by a motion to suppress such as is involved here, "should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *United States v. Leon*, ____ U.S. ___ (52 U.S.L.W. 5155, July 5, 1984); *Massachusetts v. Sheppard*,

> ___U.S. ____ (52 U.S.L.W. 5177, July 5, 1984). This case involves not a search pursuant to a search warrant but a warrantless search, which neither *United States v. Leon, supra,* nor *Massachusetts v. Sheppard, supra,* addresses. Moreover, the state did not claim in the trial court a good faith exception to the exclusionary rule for this warrantless search, as it could have. *Cf. United States v. Leon, supra.* Thus, there was no occasion for the trial court to make such an initial determination. Nor did the state claim such an exception in this court. Under these circumstances, we decide this case on the basis of what we understand to be the current state of constitutional law, which is that the exclusionary rule applies to warrantless searches.

Appendix at 14a-15a n.2. The lower court's holding thus refuses to consider the question whether good faith is applicable to warrantless searches. It notes that *Sheppard* and *Leon* "do not address" the issue directly, and it holds that since the state had not raised the issue previously (which it is excused from doing since the principle did not exist as constitutional law), "under these circumstances," the court will apply current law (*i.e.*, the law as it has existed prior to an analysis whether good faith includes warrantless searches). In summary, Amici agree with Connecticut that whether the good-faith principle applies to warrantless searches "is a question that would be answered on any remand." Petition for Certiorari at n.9.

However, if and only if it should be argued by Respondent that the court below decided the question, by holding that good faith does not apply to warrantless searches, Amici would point out that such a holding would itself be worthy of certiorari and is squarely within the questions presented by Connecticut. Connecticut's statement of the questions presented includes "*Whether the Appellate Court erred in refusing to apply to the facts of this case the good-faith exception to the exclusionary rule,* enunciated while this case was pending decision on direct review." Petition for Certiorari at i (emphasis added).

The question whether good faith applies to warrantless searches, if it had been decided below, would clearly be worthy of the writ of certiorari. This Court has previously granted certiorari in a case presenting precisely the same question. *Colorado v. Quintero*, 103 S.Ct. 3535 (1983). The cause was dismissed in this Court owing to Quintero's death. 104 S.Ct. at 543 (1983). The question has been subject to conflicting holdings. *Compare, e.g., Colorado v. Quintero, supra with Williams v. United States*, 622 F.2d 830 (5th Cir. 1980) (en banc) (extending good faith principle to warrantless searches); *see also United States v. Morgan*, No. 84-1357, 37 Cr. L. Rptr. 4030 (U.S. S.Ct. petition for cert. filed Feb. 25, 1985). There are far more warrantless searches than there are searches with warrants.* There can be no doubt that the question would be a substantial one,** that should be addressed by this Court, if the lower court had decided it.

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* Such searches occur in the course of police responses to personally viewed occurrences (as here), actions on information without time to obtain a warrant (as in Quintero), searches incident to arrest, Terry and Long frisks, inventories, border stops, and a wide variety of other circumstances. In most of these categories, there is the possibility that an officer's judgment in an uncontroverted situation is in clear objective good faith—as much so as if he relied on a warrant. Furthermore, most present situations in the field, where prompt decision is essential.

The fact situation in United States v. Morgan, supra, pending on petition for certiorari, is an example. A suspect directed by bullhorn to leave his mother's house was there held to have been arrested, as a practical matter, inside the house, even though the physical arrest took place outside. By this analysis, the Sixth Circuit concluded that this warrantless arrest violated Payton v. New York, 445 U.S. 573 (1980). The conclusion led to suppression of an automatic weapon that the accused, Morgan, had on his person when he came out to meet the police officers. The present case is also an example.

** The description of cost-benefit balance that Leon and Sheppard are based upon includes, in the balance, the impact of both warrantless search cases and cases with warrants. See Leon, supra, 104 S.Ct. at 3413 & n.6.

However, Amici present this argument merely in anticipation of the possibility that Respondent might argue that the question briefed by Connecticut—whether good faith applies to pending cases—is not squarely presented. Amici agree with Connecticut that the warrantless search issue was not addressed by the court below, because that court simply refused to apply *Sheppard* and *Leon* to this pending case. The warrantless search issue should be addressed on remand. In any event, that question should not prevent the court from granting the writ to decide the squarely presented and substantial question whether *Sheppard* and *Leon* apply to pending cases.

CONCLUSION

The decision below conflicts with the decision of the Eighth Circuit on the same issue. It conflicts with the prior holdings of this Court, which indicate that good faith is applicable to pending cases. The pendency of substantial dockets of cases before state and federal appellate courts justifies this Court's consideration of the question to provide for their correct resolution. This proposition is especially true since cases that are reviewed on appeal include the most serious criminal matters, some of which require a decade or more for resolution. The cost of applying *Sheppard* and *Leon* to these many cases would be low. The cost of refusing, as the lower court did, would be high. The writ of certiorari should be granted; or, in the alternative, the decision should be summarily reversed and remanded for reconsideration in light of *Sheppard* and *Leon*.

Respectfully submitted,

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